



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 221 OF 2016**

**NEHEMIAH STEVE WACHIRA WAMBUI.....CLAIMANT**

**VERSUS**

**MULTICHOICE KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 8<sup>th</sup> December, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 06.10.2016 through Gori, Ombongi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) 12 months' compensation of Kshs. 1, 466, 640.00.
- b) Damages to lost earnings from 19.11.2015 to date of judgment at monthly earnings of Kshs.122, 220.00.
- c) Costs of the claim.
- d) Interest on a, b, and c above.

The memorandum of response was filed on 23.11.2016 through Coulson Harney Advocates. The respondent prayed that the claim be dismissed with costs. The reply to response was filed on 21.04.2017.

It not disputed between the parties that the respondent employed the claimant as a direct sales agent at Nyeri in 2008 to 2010. In 2010, the claimant was transferred to the respondent's office at Westlands in Nairobi where he worked until July 2012. In July 2012, the claimant was promoted to the position of Sales Team Leader for Mt. Kenya and stationed at Nyeri.

On 09.11.2015 the claimant received a notice of a disciplinary hearing to be held on 10.11.2015 at 11.00am at the respondent's boardroom. The allegations levelled against the respondent included:

1. Integrity – mega dealer debts 1) Anagas – Kshs. 31, 990 (paid Kshs.19, 560 on 06.11.2015 balance 12, 430.20) Epcomms – Kshs.31, 020 Mck – Kshs.103, 554.
2. Insubordination – Caution issued on 01.11.2015.
3. Poor performance – Caution issued On 13.10.2015.

The claimant lamented that the notice to appear was too short and the notice was by the newly appointed regional sales manager one Richard Njuki instead of the respondent's human resources manager as was the practice.

The disciplinary hearing proceeded on 10.11.2015 as was scheduled and the claimant filed the record of proceedings. The said Richard Njuki was present plus four other managers. It was chaired by Gladwell Mumia, the legal officer. The claimant is recorded saying that he had a colleague one Ken who was to accompany him at the hearing but had left for an assignment to be back at 2.00pm. The claimant then is recorded agreeing to proceed in absence of the said Ken. Thus the court returns that the claimant must have opted to waive his entitlement to proceed in presence of the said Ken and as per section 41 of the Employment Act, 2007.

The court has considered the record of the disciplinary hearing and makes the following findings:

- a) The record is clear that the claimant failed to act transparently in handling the refund of Kshs.220 per 141 decoders involved. As per the termination letter, the claimant had failed to reconcile accounts despite several reminders to do so. The claimant had failed to act with decorum while interacting with mega dealers such as one Grace from whom he had collected the 141 decoders and failed to account for the Kshs. 220 per decoder as was demanded by the said Grace.
- b) The claimant had failed to respond to his supervisor's email more than a month after he had received the email and the same amounted to insubordination as was stated in the termination letter of 19.11.2015.

In such circumstances, the court returns that the respondent has established that as at the time of termination, there were valid reasons for termination as envisaged in section 43 of the Employment Act, 2007.

While making the finding, the court has considered that the respondent invoked provisions on gross misconduct under section 44 (4) (c), (e), and (g). In such circumstances, the court returns that the respondent was entitled to accord a shorter termination notice than was agreed or than was prescribed in section 35 of the Employment Act, 2007. The court follows the holding in **Shankar Saklani –Versus-DHL Global Forwarding (K) Limited [2012]eKLR** that a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. The court has considered the record of the disciplinary hearing and the record shows that the claimant was given a chance to state his case and there was no prejudice because throughout the proceedings, the claimant had all relevant information and he did not request for more time to prepare his defence one way or the other.

To answer the **1<sup>st</sup> issue** for determination, the court returns that the termination of the claimant's employment was not unfair because the claimant was accorded due procedure and the reasons for termination were valid as at the time of termination. While making that finding, the court further returns that the claimant failed to establish material breaches of the respondent's provisions on disciplinary and grievance procedures.

To answer the **2<sup>nd</sup> issue** for determination, the court returns that the prayers made were pegged on a finding that the termination was unfair and a contrary finding having been arrived at by the court, the prayers made will fail.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

**Signed, dated and delivered** in court at Nyeri this **Friday, 8<sup>th</sup> December, 2017.**

**BYRAM ONGAYA**

**JUDGE**